No. 11982

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, and INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY,

Appellants,

vs.

JIM DANDY MARKETS, INC., a Corporation; FIREMAN'S FUND INSURANCE COMPANY, a Corporation; and E. F. SMITH,

Appellees.

Reply Brief of Appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company, to Appellee Fireman's Fund Insurance Company's Brief.

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TABLE OF AUTHORITIES CITED

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Appellees.

Reply Brief of Appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company, to Appellee Fireman's Fund Insurance Company's Brief.

Reply to Argument That Appellee Fireman's Fund Insurance Company Was Not Liable to Any of the Parties.

As appears from the record, E. F. Smith, one of the defendants below, by a separate appeal, appeals from the decision of the Honorable District Court that all right, title and interest of said E. F. Smith to the leasehold described in said assignment, including all the right that defendant E. F. Smith had to the building destroyed by fire, was conveyed to Jim Dandy Markets, Inc. by the assignment

of lease dated June 27, 1946, and that there was no showing of mutual mistake or of any mistake in the execution of said assignment.

If the contentions advanced by appellant E. F. Smith prevail and it is ultimately determined that the insured premises did not pass by the assignment, then it is obvious that the measure of damages adopted by the Honorable Trial Court in allowing recovery in favor of the Jim Dandy Markets, Inc. against appellants Central Manufacturer's Mutual Insurance Company and Indiana Lumbermen's Mutual Insurance Company for the full amount of the value of the building, is incorrect, and recovery must be limited to the value of the use and occupancy of the building during such time as Jim Dandy Markets, Inc. (these appellants' insured) had the right to occupy said building under the lease, or certainly, at most, the loss and damages sustained by the insured by being deprived of the right of occupancy resulting from the fire.

This would be so, although the appellants' insured, Jim Dandy Markets, Inc., had no interest or claim to the insurance collectible by the owner, E. F. Smith from appellee, Fireman's Fund Insurance Company.

On the other hand, if the decision of the Court below that the building did pass by the assignment of the lease is correct, as pointed out in these appellants' Opening Brief, no dispute exists that the leases were not delivered from escrow and the title did not pass from defendant E. F. Smith to Jim Dandy Markets, Inc. until March 19, 1947, although the fire which destroyed the premises occurred on January 14, 1947.

Thus, the appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermen's Mutual

Insurance Company, contend, on the authorities cited in their Opening Brief, that E. F. Smith did have an insurable interest at the date of the fire.

Counsel for appellants do not believe that the force of these decisions is overcome by the citation of appellee of cases holding that a conditional vendee has an insurable interest, which is not defeated by the so-called "sole and unconditional" clause of standard California fire insurance policies.

Counsel for appellee, Fireman's Fund Insurance Company, has correctly quoted on page 2 of its brief, the provisions of the California standard form fire insurance policies contained in both the policies of appellants and appellee with reference to sole and unconditional ownership, it being provided under

> "MATTERS AVOIDING POLICY: * * * Unless otherwise provided by agreement endorsed hereon or added hereto, this entire policy shall be void. * * * (b) if the interest of the insured be other than unconditional and sole ownership * * *."

Also under

> "MATTERS SUSPENDING INSURANCE: Unless otherwise provided by agreement endorsed hereon or added hereto this Company shall not be liable for loss or damage occurring, * * * (g) while the interest in, title to or possession of the subject of insurance is changed excepting:—(1) by the death of the insured; (2) a change of occupancy of building without material increase of hazard; and (3) transfer by one or more several copartners or coowners to the others."

The foregoing provisions appear to be subject to two important principles of law. A policy of fire insurance is held not to be voided or invalid where the change of ownership occurs after the issuance of the policy.

It will be noted that the appellee, Fireman's Fund Insurance Company's policy was issued on the 10th day of June, 1945, whereas the defendant E. F. Smith and Jim Dandy Markets, Inc. did not enter into the agreement for the sale of the fixtures, machinery and equipment, nor execute the assignment of the lease until June 12, 1946.

The *case of A. Foristiere v. Aetna Insurance Co.,* 209 Cal. 92, holds that the invalidity of a fire insurance policy cannot be claimed because the interest of the insured in the property is not "unconditional and sole ownership," where the change in ownership occurred after the issuance of the policy.

As to the construction of the provisions providing for suspension of the insurance while the interest in, title to or possession of the subject of insurance is changed, it will be noted that there was no change in possession or occupancy of the building subsequent to the issuance of appellee Fireman's Fund Insurance Company's policy, since Jim Dandy Markets, Inc. was wholly in possession of the building under the pre-existing leases at the time the insurance was written, nor can title be said to have changed since it remained in E. F. Smith until compliance with the terms of the escrow by Jim Dandy Markets, Inc., which as has been seen was subsequent to the fire.

In the case of *Vierneisel v. Rhode Island Ins. Co., 77* Cal. App. 2d 229 (175 P. 2d 63), it was held that where the day before the property was destroyed by fire, the vendor had placed the deed in escrow and the vendee had

the right to complete the terms of escrow and thus become entitled to acquire the property that the insured vendors were the sole and unconditional owners of the property at the time of the fire.

The Court cited with approval in the above case, the case of *Pomeroy v. Aetna Insurance Co.,* 86 Kan. 214 (120 Pac. 344), holding that the right to recover on a fire insurance policy is not forfeited because a deed is placed in escrow awaiting the delivery thereof to the vendee.

Other cases holding that the execution of a deed and the deposit of the same in escrow, to be delivered upon the performance of certain conditions to the escrow, effects no change in "interest" within the meaning of conditions in standard fire policies providing for suspension of insurance while the interest in, title to or possession of the subject of insurance is changed.

Moore v. St. Paul F. & M. Ins. Co., 176 Iowa, 549 (156 N. W.);

Ellis v. Home Ins. Co., 108 Kan. 467 (196 Pac. 598);

Fuller v. United States F. Ins. Co., 117 Kan. 282 (231 P. 2d 53);

Philadelphia Underwriters' Agency v. Moore, 229 S. W. 490.

If the Honorable District Court properly determined that defendant and appellee E. F. Smith had no insurable interest in the premises destroyed by fire, the appellants are obviously liable for the full amount of their policies.

It is respectfully submitted, however, that if the insurance afforded by the appellee, Fireman's Fund Insurance Company, was in effect and collectible, that it should be so adjudged and applied to the purchase price of the building and leases, reducing by that amount the loss of appellants' insured, which they are called upon to pay, and this appears to follow on principles of subrogation, regardless of the fact that appellants' insured, Jim Dandy Markets, Inc., generously makes no claim for such payments.

Respectfully submitted,

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